No. 83-526

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

D.A. RICKARDS, M.A. CUSTER, PAUL V. BELKIN and JOHN S. SLEASMAN
Petitioners,

v.

CANINE EYE REGISTRATION FOUNDATION, INC., LAWRENCE M. TRAUNER, DOLLY B. TRAUNER, DAVID E. LIPTON, ALAN D. MACMILLAN, DENNIS D. OLIN, RANDALL H. SCAGLIOTTI and RALPH C. VIERHELLER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the district court properly grant, and did the Ninth Circuit, after reviewing the record in its entirety, properly affirm summary judgment dismissing petitioners' antitrust damage claims when:

   a) in an unchallenged ruling, all documents necessary to prove damages and all expert testimony were excluded from trial because petitioner failed to comply with Federal and local rules of procedure; and

   b) petitioners each admitted that any testimony as to amount of damages would be speculative and untrustworthy, without the excluded documents and expert testimony.

2. Do exceptional circumstances exist which justify a review of the district court's findings of fact; if so:

   a) did the district court commit plain error in finding that non-veterinarians' decision to establish an eye registry, which accepted examinations only from those veterinarians recognized by the American Veterinary Medical Association as having special expertise in veterinary ophthalmology, was not the result of a conspiracy;

   b) should this Court review challenged factual determinations which, even if made in petitioners' favor, would not change the outcome of the litigation?

ADDITIONAL PARTIES TO THE PROCEEDINGS IN THE DISTRICT COURT

In addition to the parties listed in the caption, the following parties were named as defendants in the district court, and were dismissed in decisions either not appealed or on which the appeal was abandoned:

American Veterinary Medical Association
American College of Veterinary Ophthalmology
Paul F. Dice
Kirk N. Gelatt
Seth A. Koch
Charles L. Martin
Charles J. Parshall
Lionel F. Rubin

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Respondents Oppose the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.[1]

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[1] The following abbreviations will be used throughout: "The Trauners" are respondents Lawrence M. Trauner (deceased) and Dolly B. Trauner;

[Continued]

OPINIONS BELOW

The Ninth Circuit opinion is also published at 704 F.2d 1449.

COUNTERSTATEMENT OF THE CASE

Petitioners' misdescribe the proceedings below and assert as fact certain claims which they failed to prove in the district court, which heard the evidence, or in the Ninth Circuit, which reviewed the entire record (C.A. A-19).

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[1] [Continued]

"CERF" is respondent Canine Eye Registration Foundation, Inc.;

"ACVO" is the American College of Veterinary Ophthalmology;

"ACVO Respondents" are Drs. David E. Lipton, Alan D. MacMillan, Dennis D. Olin, Randall H. Scagliotti and Ralph C. Vierheller;

"AVMA" is the American Veterinary Medical Association;

"Pet." and "Petition" refer to the Petition for a Writ of Certiorari.

References to the district court's Findings of Fact and Conclusions of Law, and the Ninth Circuit Opinion shall be to the petitioner's Appendix and designated "D.C." and "C.A.", respectively;

The Clerk's Record on Appeal is designated "CR", followed by the number indexed on the Clerk's docket sheet and page numbers in the document as filed in the district court;

"RT" is the Reporter's Transcript of the trial, followed by appropriate page and line numbers;

"PX" refers to plaintiffs' (now petitioners) exhibits at trial, while "DX" refers to defendants' (respondents here) trial exhibits.

All emphasis in quotations has been added unless otherwise noted.

A. The Proceedings Below

Petitioners asserted claims under Sections 1 and 2 of the Sherman Act against AVMA, ACVO, CERF, the Trauners, the ACVO respondents and other individual members of ACVO. AVMA, ACVO, and all non-California ACVO defendants moved to dismiss the claims against them for lack of personal jurisdiction and improper venue (CR 12, 76, 126). The motions were granted and the district court entered final judgments under F.R. Civ. P., Rule 54(b) on behalf of ACVO and the moving ACVO defendants (CR 45, 150-56). Petitioners filed a Notice of Appeal (CR 182) which was later abandoned (CR 323), and did not appeal from the dismissal of AVMA (CR 404).

One week after the parties had filed a Joint Pretrial Statement, five days after the Pretrial Conference was held, and less than two weeks before jury selection was to begin, petitioners had:

1) Failed to identify their expert witnesses or the substance of such witnesses' testimony in supplemental responses to interrogatories or in the pretrial statement as they had been required to do both under F.R. Civ. P., Rule 26(e)(1) and the district court's local rules;

2) Failed to list among documents to be offered as exhibits at trial any document quantifying any part of their damage claim; and

3) Disregarded the requirement of Northern District of California Local Rule 235-7(f) that they provide "a detailed statement of the relief claimed, including a particularized itemization of all elements of damage claimed."

Accordingly, respondents moved for order *in limine* to exclude expert testimony of persons not previously desig-

nated by name in the joint pretrial statement and to preclude petitioners from introducing undesignated documents into evidence (CR 341). Neither at the time the motion was heard nor at any other time did petitioners move to supplement their witness list or document designations.

The district court ordered that petitioners could not offer expert witness testimony at trial by any person they had not designated in the Joint Pretrial Statement and, in accordance with *Scott & Fetzer Co. v. Dile*, 643 F.2d 670, 673-75 (9th Cir. 1981) ordered that each side was limited to offering at trial documents from their own or their opponents' exhibit lists (CR 402).

Respondents had concurrently moved for summary judgment to dismiss petitioners' antitrust damage claims (CR 341) on the ground that, if the *in limine* motions were granted, there was no competent evidence of damages that could be offered at trial. Each petitioner had admitted at deposition that, without a detailed reference to his undesignated and excluded business documents, any estimate he might make as to the amount of damages claimed would be pure speculation. The district court granted summary judgment against petitioners on the antitrust damage claims (CR 402).

Petitioners did not challenge on appeal the *in limine* ruling excluding expert testimony and documents. The Ninth Circuit necessarily affirmed the summary judgment ruling because "There thus was no competent or relevant evidence from which a jury could fairly estimate damages . . ." (C.A. A-20).

Trial on petitioners' antitrust injunctive claims was to the district court with an advisory jury (CR 588 at 63:21-24) and to the jury on common law claims. Trial proceeded for 36 days, producing 5,832 pages of report-

er's transcript and some 600 trial exhibits. At the close of petitioners' case, respondents moved under F.R. Civ. P., Rule 41(b) for dismissal of the antitrust injunctive claims and under F.R. Civ. P., Rule 50(a) for a directed verdict on the common law claims (CR 470). The motions were fully briefed (CR 471, 472, 477, 480-83), argued (30 RT 5468:20-5471-7) and granted (30 RT 5471:8-5475:21). Petitioners made a motion for reconsideration, which was also fully briefed (CR 534, 537, 540, 543) and denied (CR 554). The Ninth Circuit affirmed "[a]fter viewing the record in its entirety" (C.A. A-19).

The petition raises only questions concerning the antitrust rulings for summary judgment and under Rule 41(b), and these questions are limited to the issues of damages and the existence of a conspiracy. Petitioners do not challenge the orders *in limine* concerning trial experts and exhibits; nor do they raise any issue respecting entry of a directed verdict against their common law claims.

B. The Facts

The facts established by the evidence as a whole are those found by the district court.

1. *AVMA and ACVO*

Each petitioner and each respondent, other than CERF and the Trauners, is a member of the AVMA, a professional organization representing the vast majority of American veterinarians (15 RT 2966:13-22). The AVMA sanctions specialty boards in various areas of veterinary medicine, and in so doing, represents to the lay public that members of recognized specialty boards are in fact specialists who have proven themselves especially well qualified in particular areas of veterinary medicine (2 RT 339:22-340:3, 15 RT 2969:25-2970:16, 21 RT 3875:1-9).

The ACVO is the specialty board recognized by the AVMA for veterinary ophthalmology; ACVO is comprised of veterinarians who possess and have established their special training, skill and competence in veterinary ophthalmology (2 RT 339:22-340:3, 16 RT 2987:8-19; 20 RT 3816:12-15; 21 RT 3875:1-9; 24 RT 4487:4-19; 25 RT 4768:19-4769:6; 29 RT 5321:18-5322:1, 5453:6-12). AVMA has identified no veterinarians except members of ACVO as possessing special training, skill and competence in veterinary ophthalmology (10 RT 1905:5-1906:7; 16 RT 2987:8-19, 18 RT 3427:17-3428:2; 21 RT 3875:1-9; 24 RT 4487:4-19; 25 RT 4768:19-4769:6; 4769:24-4770:3; 29 RT 5321:18-5322:1). Respondents Vierheller, Olin, Lipton, MacMillan and Scagliotti are members of ACVO (15 RT 2798:5-6; 23 RT 4335:3-5, 29 RT 5405:11-15, 5406:16-18, 5414:23-24). None of the petitioners are members of ACVO (CR 1 at 5:12-13).

ACVO was formed in 1970 (PX:322 at 000617-8; 15 RT 2798:9-10). In 1972 and continuing to the present, under the aegis and general supervision of the AMVA, ACVO had administered an entrance examination to test the knowledge and achievement of persons who: (a) have presented their credentials for admission into ACVO, and (b) have had their credentials approved by the ACVO Credentials Committee pursuant to its operating procedures and guidelines (27 RT 5028:2-9). The multiphase examination has been administered annually with a written Qualifying Examination and a subsequent Oral and Practical Examination administered to those who pass the Qualifying Examination (27 RT 5028:10-17). The Qualifying Examination is not intended to evaluate a candidate's achievement in only those areas of knowledge necessary for performing a screening examination for detecting hereditary canine eye defects. Rather, the Qualifying Examination is designed to test the candidate's achievement level in the area of veterinary ophthalmology as a whole. (27 RT 5028:18-25) The ACVO examination has been fair and impartial. Approximately

84% of the persons who have taken the ACVO Qualifying Examination have ultimately passed it. (10 RT 1813:2-1814:14)

No petitioner has objectively demonstrated by any process of peer review that he has special training, skill or competence in veterinary ophthalmology. Petitioner Rickards sat for the Qualifying Examination seven times and failed each time (27 RT 4997:12-15). Petitioner Belkin's credentials were rejected by the Credentials Committee in 1975 because he had failed to adequately communicate sufficient breadth of knowledge in his submitted case reports (DX:EV). Belkin never reapplied to the ACVO, although he was invited to do so (29 RT 5325:10-5328:14). Neither petitioners Custer nor Sleasman ever applied to become ACVO members (17 RT 3262:11-13; 20 RT 3804:10-14).

Aside from the ACVO examination, there exists no objective way of determining which veterinarians have special competence in veterinary ophthalmology (17 RT 3256:22-3257:3; 26 RT 4927:19-4928:4; 29 RT 5322:12-25). No veterinarians except members of ACVO have ever been identified by name to the lay public by AVMA, or any other veterinary organization, as being competent in veterinary ophthalmology (2 RT 339:4-7; 10 RT 1905:5-1906:7, 16 RT 2987:8-19; 18 RT 3427:17-3428:2; 21 RT 3875:1-9; 24 RT 4487:4-19; 25 RT 4768:19-4769:6, 4769:24-4770:3; 29 RT 5321:18-5322:1).

2. *The CERF Program*

Neither the Trauners nor any officer or director of CERF is a veterinarian or has any training in veterinary medicine (3 RT 397:15-22; 4 RT 570:19-20; 10 RT 1897:22-1898:8). CERF was incorporated on November 12, 1974 as a non-profit, tax-exempt, charitable corporation (PX 76 at 000123-26). Its purposes, as stated in its 1974 Constitution, include: "To collect, collate and disseminate information concerning hereditary eye diseases in dogs by establishing a Registry for the listing of

purebred dogs of those breeds which are susceptible to hereditary eye diseases, which have been examined and diagnosed as being phenotypically asymptomatic for these diseases at the time of examination by a Board certified veterinary ophthalmologist or by a veterinarian who has been designated by the American College of Veterinary Ophthalmologists, or a committee thereof, as being qualified by postgraduate training in canine ophthalmology to perform such examinations" (PX 76 at 000127). No officer or director of CERF ever had any connection with the formation or operation of ACVO, or with the ACVO examinations (4 RT 570:21-25; compare PX:322 at 000617-8 to PX 76 at 000125).

Beginning in late 1975, CERF issued "certificates" to owners of dogs whose eyes had been examined by certain veterinarians and found asymptomatic (or "clear") of major hereditary eye defects at the time of the examination (PX 135). A certificate was only issued if: (a) the examination was performed by an ACVO member, using the examination form provided to the examiners free of charge by CERF; (b) the ACVO examiner returned one copy of the CERF form directly to CERF; (c) the dog owner sent to CERF both the original, ink-signed copy of the form stating the dog was "clear" of major hereditary defects at the time of the examination and a registration fee of $5.00; and (d) at the time of the examination, the dog satisfied the "minimum ages" criteria established for certification of certain breeds (PX 135).

Whether or not the dog's owner ever applied for a certificate, CERF collected information regarding the examination from the individual examining veterinarians and tabulated such results in periodic reports which CERF disseminated to veterinarians, breeders, dog clubs and researchers (4 RT 559:18-20; 10 RT 1848:8-17). Additionally, more detailed information regarding specific eye examinations was available from CERF upon request (10 RT 1849:16-1850:17, 1854:7-13).

ACVO members and a special ACVO committee provided CERF with scientific advice, e.g., nomenclature for specific diseases, determination of which diseases were significant and the design of the examination form (2 RT 343: 3-344:24; 3 RT 397:15-398:13; 9 RT 1564:10-1565:3, 1603:13-1604: 20; 16 RT 3032:10-20, 3034:6-3035:25). An ACVO committee, and subsequently the ACVO, approved the scientific aspects of the CERF examination form (DX:FG, p. 2, ¶ 4(b)). Individual ACVO members used CERF examination forms and returned copies thereof to CERF for inclusion in its data (24 RT 3485:20-23; 29 RT 5405:6-20, 5406:16-23; PX 161 at 000259).

CERF's decision to accept examination reports only from ACVO diplomates (or "designates") was made unilaterally by CERF, without consultation with any member of ACVO (2 RT 327:16-328:14; 3 RT 413:5-11; 14 RT 2717:4-22; 16 RT 3101:18-3102:8; PX 135 at 000222-3). No member of ACVO gave advice to CERF on its Constitution or By-laws before they were filed with the California Secretary of State (2 RT 325:5-8, 326:2-328:14; 5 RT 705:16-706:17; 13 RT 2399:5-12; 16 RT 3024:20-3026:14).

CERF was willing to accept examination reports from veterinarians designated by ACVO as possessing special competence in veterinary ophthalmology (2 RT 348:2-9; 10 RT 1838:3-8; PX 372). The ACVO, however, never designated any non-ACVO member to CERF, although some members of ACVO were in favor of doing so (15 RT 2874:19-2875:3, 2913:25-2914:11, DX:FG, p. 2, ¶ 5(a)). The ACVO determined that it was not its function to appoint "designates" for any other organization, and that its charter from the AVMA did not permit it to test for and/or recognize expertise in veterinary ophthalmology except through the ACVO membership process itself, which had been recognized and approved by the AVMA (2 RT 348:22-349:6; 15 RT 2875:4-23).

Individual members of ACVO and other veterinarians (including certain ACVO respondents) suggested to CERF that it establish criteria which would allow more veterinarians to perform eye screening examinations which would be acceptable to CERF (DX:DU; PX 14; *see also*, 3 RT 399:22-400:10, 441:20-442:3; 14 RT 2712:16-25; 15 RT 2874:8-12; 16 RT 3067:4-3072:20, 3085:6-3088:22; 25 RT 4614:5-17; DX's:FG, FL FP). CERF declined to do so, motivated by reasons of quality control and its own inability to develop such criteria (3 RT 410:9-14, 466:12-20; 4 RT 570:7-18; 14 RT 2615:17-2616:12, 2703:16-25).

CERF never accepted examination reports prepared by persons not members of ACVO (2 RT 216:14-22). CERF applied its examiner requirements in a uniform and even-handed manner, and refused to accept examination reports even from veterinarians Mrs. Trauner personally believed to be competent, but who had not objectively demonstrated their competence through the peer review procedures necessary for membership in ACVO (2 RT 338:22-339:3, 341:21-342:2; 4 RT 556:19-21, 558:10-559:9; DX:FO). CERF would have accepted examination results for its program from any veterinarian (including petitioners) who demonstrated special skill, training and competence in veterinary ophthalmology by satisfying the requirements for membership in ACVO (3 RT 475:1-4).

CERF offered a new service and product. Prior to CERF's incorporation, there had never been an all-breed eye registry which accumulated reliable examination data and offered verification to dog owners and breeders that an examination had been performed by a reliable examiner. (2 RT 230:1-18; 5 RT 766:4-24; 24 RT 4476:5-13)

No entry barriers prevented plaintiffs or anyone else from establishing an eye registry program in competition with CERF (6 RT 972:18-19; 26 RT 4936:12-25).

CERF chose to accept examination results only from ACVO members in order to insure the quality and accuracy of its data and the reliability of its certificates (3 RT 386:24-387:8, 410:9-14).

Most veterinarians have little training in veterinary ophthalmology (11 RT 2156:1-2157:20, 17 RT 3236:8-14; 18 RT 3373:19-3380:19; 25 RT 4759:25-4767:23). Not all veterinarians who claim to be are competent to perform eye screening examinations to detect the presence or absence of hereditary disease (11 RT 2175:1-8; 29 RT 5310:3-11). Non-veterinarians lack the expertise either to perform eye examinations for the CERF program or to identify which veterinarians have the necessary expertise (3 RT 443:10-444:3; 4 RT 570:7-20; 10 RT 1897:5-1898:8; 11 RT 2116:1-18).

No test was ever devised or suggested to CERF by any segment of the veterinary profession as a means of identifying competent veterinary ophthalmologists, except the membership procedure of ACVO (3 RT 466:12-16; 10 RT 1920:24-1921:6; 26 RT 4928:20-4929:14; 29 RT 5377:12-15).

Dog breeders and veterinary researchers used and relied upon the CERF program and its data because CERF's examiners were known to be competent by an objective standard (12 RT 2302:18-22, 2305:6-25; 24 RT 4477:23-4479:6). Without an assurance that the CERF certificate signified an examination done by a qualified examiner (i.e., an ophthalmic specialist), the certificates would have had no value to breeders or owners of dogs, including petitioners' clients (12 RT 2272:20-2273:6, 2276:7-13, 2305:6-25, 2311:20-2312:9; 20 RT 3704:1-11, 3706:11-20). Unless researchers could be assured that the examinations had been performed by a reliable expert in ophthalmology, CERF's data compilation would be meaningless for scientific or research purposes (16 RT 2986:13-21; 24 RT 4476:16-21; 26 RT 4877:2-21; 29 RT 5452:21-5453:5).

CERF had no financial interest in either the examinations performed or the use of the CERF examination form. CERF distributed its examination forms free of charge (PX 265) and did not share in any examination fee charged by an examiner (4 RT 603:21-24). The Trauners received no remuneration for their activities on behalf of CERF (3 RT 472:21-473:12; PX 135); no veterinarians received any remuneration from CERF for either providing scientific advice or sending data to CERF (3 RT 438:22-24).

On one occasion, Mrs. Trauner asked ACVO members for information on the fees they charged for eye screening examinations (4 RT 632:24-635:22; DX's:GR 1, GR 2). No ACVO respondent provided any fee information to her (4 RT 638:13-24, 639:12-15). Mrs. Trauner never communicated to anyone the fee information she received from other ACVO members (4 RT 643:1-9).

CERF suspended its registration activities on June 1, 1979 because of petitioners' suit (DX:MM). From CERF's inception until that date, approximately 90,000 examinations were performed using CERF examination forms, including re-examinations of the same animal (10 RT 1843:13-1844:2), only a small fraction of the total number of pure-bred dogs in the United States (26 RT 4936:5-25). The owners of only 8,900 dogs—less than 10% of all dogs examined using a CERF examination form—ever applied to CERF for issuance of a certificate (10 RT 1844:3-19; DX:OS).

Neither before, during nor after CERF, did any petitioner ever offer to his clients any registration and/or third-party verification services for genetic ophthalmic screening examination of pure-bred dogs, such as CERF offered (19 RT 3516:15-23; 20 RT 3785:6-8; 3798:4-8; 26 RT 4871:2-3; 28 RT 5291:11-17). Petitioners did offer, both before and after CERF began its program,

certain ophthalmic services to clients; their clients have continued to deal with them for such services, and other veterinarians continue to refer clients to petitioners for ophthalmic services (11 RT 2169:12-24; 12 RT 2284:8-13; 28 RT 5296:25-5297:14).

REASONS FOR DENYING THE WRIT

I. THE PETITION SEEKS A SECOND APPELLATE REVIEW OF FACTS AND EVIDENCE, NOT OF ANY LEGAL PRINCIPLE

Petitioners' "Question Presented" and the Petition's supposed "Reasons for Granting the Writ" pose no legal question. The Petition merely challenges the district court's analysis of the evidence on the entire record, which the Ninth Circuit affirmed after its independent review of the entire record (C.A. A-19). A writ of certiorari should not issue merely to review a massive record in its entirety for yet a third time.

"A court of law, such as this Court is, rather than a Court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *Goodyear Tire & Rubber Co. v. Ray-O-Vac Co.*, 321 U.S. 275, 278 (1944); *Williams Mfg. Co. v. United Shoe Machinery Corp.*, 316 U.S. 364, 367 (1942); *Baker v. Schofield*, 243 U.S. 114, 118 (1917). Additionally, this Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

Moreover, the way petitioners frame their questions and argument highlights their fundamental misunderstanding of procedures which correctly led both courts below to rule for respondents. Petitioners ask whether

there was sufficient evidence of a conspiracy *to go to a jury*; but this was never a jury question. Summary judgment was entered against petitioners' antitrust damage claims before trial, on the basis that, even if a conspiracy (violation) and impact (*fact* of damage) could be proven, any damages were admittedly speculative. With this ruling on the damage issue, the only antitrust claim left for trial was petitioners' injunctive claim, tried to the court. On this wholly equitable issue, the court was entitled to weigh the evidence and make findings under the "clearly erroneous" standard, F.R. Civ. P., Rule 52(a).

II. THE DISTRICT COURT AND NINTH CIRCUIT OPINIONS WERE CORRECT AND IN HARMONY WITH DECISIONS OF THIS COURT

A. The District Court Correctly Entered Summary Judgment Against Petitioners' Antitrust Damage Claim, Admittedly Based on Speculative and Untrustworthy "Evidence"

Petitioners' antitrust damage claims were dismissed on a motion for summary judgment before trial (CR 402). In reviewing the district court's order granting summary judgment, the Ninth Circuit had to determine whether there was a *genuine* issue as to any *material* fact in dispute. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288 (1968). On petitioners' admissions, there were no such genuine issues.

1. *Petitioners' Antitrust Damage Claims Were Based Entirely Upon Speculation and Guesswork*

However free-flowing the evidence of antitrust damages might be, "the factfinder is not entitled to base a judgment on speculation or guesswork." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 124 (1969). Petitioners each testified at deposition that without undesignated documents, any testimony as to the

amount of damages claimed would be nothing but speculation and conjecture.[2]

a. *Rickards*

Rickards testified at deposition that it would be impossible for anyone to determine his ophthalmic revenue without an examination of his individual patient records. He designated no such documents. Had he done so, an examination of the records would have been incomplete because Rickards destroyed certain records within the four years preceding the filing of the complaint (CR 289 at 202-4, 207).

Rickards further testified that a detailed statistical analysis of his records *by an expert* would be needed in order to determine the amount of his lost profits allegedly attributable to his exclusion from the CERF program (CR 396 at 1086-7, 1095-6). He named no expert. Moreover, there were no lost profits: Rickards also admitted that he has made no less money as a result of the CERF program and activities about which he complained (CR 396 at 1083).

b. *Belkin*

Belkin admitted at deposition that he was unable to make any reasonable estimate of his alleged lost profits absent a detailed analysis of individual patient records (CR 391 at 134-196). He designated no such documents. Belkin admitted in any event that his business had not decreased, that each year his veterinary practice became more profitable. He acknowledged that any estimate of damages would be speculative (CR 392 at 273-74).

c. *Sleasman*

At deposition Sleasman admitted to having no way to determine the amount of business he allegedly lost because CERF would not recognize his examination re-

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[2] Petitioners did not question in the Ninth Circuit and do not raise here the propriety of the district court's order excluding undesignated documents and unidentified experts.

ports (CR 385 at 77). He designated no records, but even if he had done so, they would not have provided a reliable basis for damage proof in any event, since he filled out his records of examinations inconsistently (CR 385 at 47-48).

d. *Custer*

Custer admitted that his damage estimates were "strictly a guess" (CR 389 at 414-419). Custer would have had to consult his records in order to do anything other than to speculate on the relationship of ophthalmology to his other practice, and to determine when—if ever—his ophthalmology practice started to fall off (*id.*). He designated no such records.

e. *The So-called Damage Testimony of Dog Owners*

After summary judgment was heard and decided, several of petitioners' dog-owner customers testified on the common law claims not the subject of this Petition. On the antitrust issue, this testimony was relevant only to the issue of *impact*, which had been assured *arguenda* for purposes of the summary judgment determination. The testimony could not have been translatable to any dollar figure of lost profits or damages, which petitioners admitted was speculative. Moreover, the testimony proved there was no impact. The Ninth Circuit held:

> Appellants' regular clients sought appellants' veterinary services before and after creation of CERF's registry system and thus the evidence does not show that an *ongoing* business relationship between appellants and their regular clients was somehow disrupted. Further, because appellants did not perform genetic eye-screening exams for purposes of an eye registry, CERF's registry system did not interfere with appellants' specific business relations.

For example, Custer's client, Mrs. Campbell, testified:

> Q. If Dr. Custer had offered to you—excuse me—his own version of the CERF examination form

and his own registration form, would you have gone to Dr. Custer?

A. I would prefer to.

Q. Would you have gone to Dr. Custer if he had offered his own version of the CERF examination form and registration form?

A. Yes.

Q. So the reason you did not go to Dr. Custer was that he did not offer the service; is that not right?

A. That's correct.

20 R.T. 3718:21-3719:2.

But as for veterinarians not personally known to these breeders, only an objective standard of competence, such as membership in ACVO would make an examination reliable and acceptable. Mrs. Campbell testified:

Q. Now, would it be satisfactory to you, as a breeder—excuse me one minute. Would it be satisfactory to you, as a breeder, if an examination had been performed by a doctor not a member of the ACVO, but a veterinarian whom you did not know?

A. No.

Q. Why is that?

A. I would not have any way of knowing his competence.

Q. All right. Now, as a breeder, do you believe that if a man or a woman is a member of the ACVO, that you feel comfortable in relying upon that person as having competence in ophthalmology?

A. Yes.

Q. And is that because the veterinarian association has signified that these people are, in fact, competent?

A. Yes.

20 R.T. 3707:5-19.

Sleasman's client, Gail Rivers, testified:

Q. Did you believe that the CERF number did signify that the examination had been performed by an eye specialist?

A. Yes.

Q. And was that important to you?
A. Yes.
Q. And if you could not rely, if you could not have relied upon that knowledge that the examination had been performed by an eye specialist, would CERF have been of any value to you?
A. No.

12 R.T. 2305:26-25.

2. *Summary Dismissal of Petitioners' Antitrust Damage Claims Offended No Constitutional Right*

Petitioners' second Question Presented argues that summary dismissal of their antitrust damage claim deprived them of a right to a jury trial. Although the Petition ignores the question, we briefly address it.

In *In re Peterson*, 253 U.S. 300, 310 (1920), this Court held that summary judgment procedures do not deprive a litigant of a right to a jury trial:

> No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined. It does not infringe the constitutional right to a trial by jury, to require, with a view to formulating the issues, an oath by each party to the facts relied upon.

See, First National Bank of Arizona v. Cities Service Co., supra, 391 U.S. 253.

B. The District Court Correctly Found Under Rule 41(b) That The CERF Program Did Not Violate The Antitrust Laws

Petitioners entirely ignore that trial on their antitrust injunctive claim was to the court, although it elected to use an advisory jury pursuant to F.R.Civ.P., Rule 39(c) (CR 588 at 63:21-24). The ultimate responsibility for finding the facts remained with the district court, *Frostie Co. v. Dr. Pepper Co.*, 361 F.2d 124, 126 (5th Cir. 1966),

and it was free to disregard entirely the advisory jury, *Huser v. Santa Fe Pomeroy, Inc.*, 513 F.2d 1298 (9th Cir. 1975); *Chicago & N.W. Ry. Co. v. Minnesota Transfer Ry. Co.*, 371 F.2d 129 (8th Cir. 1967); *Aetna Ins. Co. v. Paddock*, 301 F.2d 807, 811 (5th Cir. 1962), as petitioners' counsel acknowledged (1 RT 68:2169:8).

The findings of fact by a trial court after a Rule 41(b) motion "shall not be set aside unless clearly erroneous," Rule 52(a), F.R.Civ.P. In *Zenith Radio Corp. v. Hazeltine Research, Inc., supra*, 395 U.S. 100, 108, this Court held:

> The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed."

Those challenging findings of fact under the "clearly erroneous" standard face "an almost insurmountable burden." *International Boxing Club v. United States*, 358 U.S. 242, 252 (1959). Responsibility for assessing the record to determine whether factual findings comport with the "entire evidence" is primarily that of the court of appeals. *See, Mobil Oil Corp. v. Federal Power Commission*, 417 U.S. 283, 310 (1974); *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 491 (1951). The Ninth Circuit performed this function (C.A. A-19). On the entire evidence, both courts found no conspiracy.

1. *CERF Unilaterally Decided to Accept Examination Data Only from ACVO Members*

Section 1 of the Sherman Act applies to combinations, contracts and conspiracies which restrain interstate trade. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960). Essential to such a violation of the antitrust laws is an *agreement* or *combination*, "the purpose and effect of which is restraint of trade and suppression of competition." *Viking Theatre Corporation v. Paramount*

Film Distributing Corp., 320 F.2d 285, 293 (3rd Cir. 1963), *aff'd*, 378 U.S. 123 (1964).

The amount of cooperation between CERF, ACVO and/or individual ACVO members was limited to: (a) giving scientific advice, and (b) submitting examination results to CERF on CERF's own form (2 RT 343:3-344:24; 3 RT 397:15-398:13; 9 RT 1563:10-1565:3, 1603:13-1604:20; 16 RT 3032:10-20, 3034:6-3035:25). The only "understanding" between CERF and individual ACVO members was that, for the CERF program to succeed, ACVO members had to support it by providing eye examination information to CERF on the forms it devised (PX:18; 3 RT 399:17-21). For ACVO members to give such support to CERF was no more an unlawful conspiracy than a distributor's agreement to become an exclusive marketer of a manufacturer's product after having been solicited by the manufacturer to do so. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); *see Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068 (3rd Cir. 1978).

The antitrust laws have always permitted a trader such as CERF to limit those with whom it would deal and to decide upon what terms it would deal. *United States v. Colgate & Co.*, 250 U.S. 300 (1919). This is particularly so when a trader makes no attempt to influence the practices of those with whom it chooses to deal. CERF made no effort to control ACVO or influence the procedures under which it admitted members.

Montague & Co. v. *Lowry*, 193 U.S. 38 (1904) is far from being "identical to the case at bar" (Pet. 22). *Montague* involved a "scheme which includes the enhancement of the price of unset tiles by the San Francisco dealers" 193 U.S. at 46. "It [was] not the simple case of manufacturers of an article of commerce between the several states refusing to sell to certain other persons"

193 U.S. at 45. Defendants were tile wholesalers and manufacturers of the tile, who had joined The Tile, Mantel & Grate Association of California. The manufacturers jointly agreed to sell in San Francisco only to the wholesalers in the Association. The wholesalers jointly agreed to purchase only from manufacturer members. The wholesalers and manufacturers agreed that the wholesalers would sell tile to non-members for not less than a fixed "list price which tended to be fifty percent higher than on sales to members." In addition to the purpose to fix prices, the Supreme Court found objectionable that membership in the association "was . . . to be *arbitrarily* determined by the association" 193 U.S. at 46-47.

Unlike the manufacturers in *Montague*, there was no one with whom CERF horizontally agreed as who would be acceptable examiners. Members of ACVO did not agree not to deal with anyone (*see, e.g.*, 24 RT 4480:22-4481:8). There is no evidence of ACVO members fixing prices. (*See*, Section II, 3.2 below) ACVO was formed for purposes wholly apart from the alleged restraint, and operated wholly independently of CERF. Prospective members of ACVO were not arbitrarily excluded from membership, but were evaluated on proven competence alone, for reasons wholly apart from and independent of the CERF program. (*See, e.g.*, 27 RT 5027:17-5028:25.)

2. There Was No Price-Fixing Conspiracy

No ACVO defendant ever discussed fees with CERF or with one another. Mrs. Trauner's isolated requests for fee information were ignored by the ACVO defendants. Neither Mrs. Trauner nor anyone at CERF communicated any fee information to any member of ACVO (DX:GR2; 4 RT 632:24-643:9; 5 RT 842:22-845:11; PX:199).

The evidence did not even approach the "sporadic exchange of price information" which has been held insuffi-

cient to raise a triable price-fixing issue in *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1357 (9th Cir. 1982).

Moreover, Mrs. Trauner, acting as a lay person on behalf of a group with consumer interests in the fees charged for genetic eye exams, had a right to gather and publish reports on veterinary services, including reports of prices within the industry. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Maple Flooring Mfg. Ass'n v. United States*, 268 U.S. 563, 584 (1925).

The evidence failed to show any parallel pricing behavior by ACVO members, let alone any price-fixing agreement. Charges by ACVO members for eye screening examinations at clinics generally varied as much as 50%, between $5.00 and $7.50 per dog, although for some examinations the examiner received nothing (29 RT 5461:9-12). Some examiners charged $10.00 per dog (5 RT 847:6-10), and some recouped only a part of their travel expenses (24 RT 4411: 1-20).

III. REVIEW BY THIS COURT WOULD BE FUTILE BECAUSE REVIEW ON THE QUESTIONS PRESENTED WILL LEAVE UNCONSIDERED INDEPENDENT GROUNDS FOR THE DECISIONS BELOW

This Court's Rule 21(a) provides:

> (a) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be argumentative or repetitious. The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. *Only the questions set forth in the petition or fairly included therein will be considered by the Court.*

The only two questions fairly included in the Petition are: (1) whether there was sufficient evidence of an agreement, and (2) whether there was competent and relevant evidence of antitrust damages. However, the district court dismissed petitioners' claims on totally independent grounds (even if an agreement and damages had been proven) which the Ninth Circuit affirmed. Given the limited scope of the Questions Presented, review by this Court would be futile.

A. The CERF Program Was Reasonable and Pro-Competitive

The district court held that "under all of the facts and circumstances of this action, and regardless of the relevant market utilized, CERF's determination was not unreasonable, or adopted for anticompetitive reasons, and had no unreasonable effect on competition in the relevant market" (D.C. A-43).

The Court of Appeals affirmed, holding:

> Even if there were sufficient evidence of an agreement, the record before us demonstrates that the "agreement" amounts to nothing more than a type of exclusive dealership agreement: CERF provided examination forms only to ACVO members and would accept no other type of form for inclusion in its registry. The reason justifying this CERF-ACVO relationship is valid. ACVO members are the only veterinarians who have objectively demonstrated that they are qualified to perform the hereditary eye examinations. Obviously, examination reliability is of utmost concern to CERF.

(C.A. A-22).

This conclusion is not addressed in the Petition.

B. Petitioners Sleasman, Belkin and Custer Have No Antitrust Claim

The district court held:

> II.4. The inaction of plaintiffs Sleasman, Custer and Belkin in failing to apply for ACVO member-

> ship within the four years preceding their complaint bars their antitrust claim for CERF's refusal to deal with them. Essential to a successful claim of refusal to deal is a showing by plaintiffs that they made a demand of the defendants and were refused, unless such a demand would be futile.

(D.C. A-43, A-44). This conclusion of law was neither challenged on appeal nor addressed in the Petition.

C. Petitioners Lack Standing to Challenge the Alleged Price Fixing

The district court held:

> II.5. . . . plaintiffs have no standing to claim injury from the price fixing alleged in the complaint.

(D.C. A-44)

Petitioners did not challenge this decision on appeal and do not raise it here.

CONCLUSION

The Petition seeks only a review of facts. Petitioners' questions do not set forth or fairly include independent reasons for dismissal of their claims. Because there are no special or important reasons for discretionary review of the decisions below and because review on petitioners' questions would be futile, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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